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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))	MB Docket No. 05-255

MOTION TO ACCEPT AS TIMELY FILED THE COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

On September 19, 2005, Qwest Communications International Inc. ("Qwest") attempted to submit the attached **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** using the Federal Communications Commission's ("Commission") Electronic Comment Filing System ("ECFS"). Since this effort was unsuccessful due to apparent technical difficulties with the ECFS, Qwest is resubmitting its comments today. Qwest asks that the Commission accept its comments as timely filed.

Qwest first attempted to file its comments electronically via the ECFS around 5:00 PM Mountain Time on September 19. Numerous other attempts continued throughout the evening until the Commission's filing deadline of 10:00 PM Mountain Time. These filing attempts were unsuccessful.

Qwest's technical support personnel were also unable to submit the filing via the Internet and were unable to find a problem on Qwest's side of the network. Thus, Qwest can only conclude that there was a problem with the Commission's ECFS or some other obstacle beyond Qwest's control that prevented Qwest from uploading its comments in a timely manner. Qwest certifies that it took all reasonable and prudent steps to have the document filed prior to the deadline for filing on September 19, 2005.

Prior to the 10:00 PM Mountain Time deadline on September 19, 2005, Qwest also submitted its comments via electronic mail to Timothy May of the Commission's Media Bureau. Subsequently, on the morning of September 20, 2005, Mr. May informed Mr. Ross Dino of Qwest that Qwest's comments would be accepted as timely filed. Per the instructions on the ECFS website, Qwest also contacted Mr. William Caton, of the Secretary's office, and advised him of the situation. On the advice of Mr. Caton, Qwest is submitting this Motion.

Attached to this Motion to Accept as Timely Filed are an original and four copies of Qwest's comments in MB Docket No. 05-255. Qwest respectfully requests that the Commission accept Qwest's comments as timely filed on September 19, 2005.

By: Michael B. Adams, Jr. /LEA

Michael B. Adams, Jr.
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6652

Its Attorney

QWEST COMMUNICATIONS
INTERNATIONAL INC.

September 20, 2005

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 05-255
Competition in the Market for the	)	
Delivery of Video Programming	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Blair A. Rosenthal
Robert B. McKenna
Michael B. Adams, Jr.
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6652

Attorneys for

QWEST COMMUNICATIONS
INTERNATIONAL INC.

September 19, 2005

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SUMMARY

Qwest's comments focus on the entry of ILECs such as Qwest into the competitive video market, either directly or in partnership with a video affiliate. Qwest also addresses the steps the Commission can take to ensure the viability of such competition.

ILECs and their affiliated video providers are among the most likely providers of wireline-based MVPD competition. This is due to many factors, including their: experience at providing broadband services, existing networks, technical resources, current rights-of-way, and ability to bundle their current voice and Internet offerings together with video services. For example, Qwest has been operating as a MVPD distributor for nine years and currently serves approximately 60,000 video subscribers in Arizona, Colorado and Nebraska, passing a total of 535,000 homes. Qwest offers basic analog, expanded basic digital, premium programming and music channels to its customers at highly competitive prices, which are as much as 25 percent lower than the rates of the incumbent CATV providers.

However, local franchising rules, especially those requiring that a new competitive wireline CATV provider " build out" its facilities to match the entrenched incumbent, are hindering Qwest's efforts to provide competitive video services. Such rules often impede new wireline competitors and serve to protect incumbent CATV providers. Indeed, Qwest's experience is a case study of the serious problems new entrants have in obtaining the necessary franchises from municipal governments.

The Commission should continue to take affirmative steps to promote wireline video competition, and it should preempt those local franchising requirements that are functioning as barriers to competitive entry. Likewise, with respect to its program access rules and retransmission consent rules, the Commission needs to actively ensure that new market entrants

will continue to obtain access to video content over the long term at reasonable rates, terms and conditions.

Before the
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Annual Assessment of the Status of	)	MB Docket No. 05-255
Competition in the Market for the	)	
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COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") respectfully submits these comments in response to the Federal Communications Commission's ("Commission" or "FCC") inquiry soliciting data, information, comments, and analyses pertaining to the status of competition in the market for the delivery of video programming.[1]

I. INTRODUCTION

Qwest[2] has been operating as a wireline multichannel video programming distributor ("MVPD") for nine years and is currently expanding into new markets.[3] Qwest currently serves

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[1] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 05-155, Notice of Inquiry, MB Docket No. 05-255 (rel. Aug. 12, 2005) ("*Notice*").

[2] Qwest is the parent of a Regional Bell Operating Company ("RBOC") that provides incumbent local exchange services in fourteen states, as well as a number of other subsidiaries that provide interexchange, local exchange and information services throughout the United States. As discussed herein, Qwest also provides cable television services through a corporate affiliate.

[3] Qwest uses several types of wireline technology to provide video services. In the western suburbs of Omaha, Nebraska, Qwest uses a Hybrid-Fiber-Coax ("HFC") architecture to deliver more than 75 expanded basic channels. In Phoenix, Arizona and Douglas County, Colorado, Qwest uses Very High-Speed Digital Subscriber Line ("VDSL") architecture to deliver more than 210 digital expanded basic channels, using a switched digital video instead of a broadcast method of transmission. Separately, Qwest is deploying fiber to the premises ("FTTP") technology at RidgeGate, a master planned development in the city of Lone Tree, Colorado. The

approximately 60,000 video subscribers in Arizona, Colorado and Nebraska, passing a total of 535,000 homes in direct competition with the largest incumbent cable television ("CATV") operators such as Cox and Comcast as well as direct broadcast satellite ("DBS") operators DirecTV and EchoStar, all of whom have exponentially larger market share on a regional and national basis. Qwest's past experience has given it a clear understanding of the systems, processes and costs of placing remote terminals within public or private rights-of-way for video services, as well as the economic and regulatory challenges associated with competitive entry into the video services market.

Qwest offers basic analog, expanded basic digital, premium programming and music channels to its customers at pricing that is highly competitive with that of incumbent providers. For example, in the Phoenix, Arizona market, Qwest's retail rate for 200+ channels of basic and expanded basic digital programming is 25 percent lower than the rates of the incumbent CATV provider, Cox Communications.

Until recently, Qwest has been focusing its efforts on obtaining either geographically limited "pocket" franchises to serve newly constructed communities or "market" franchises where Qwest obtains a city-wide agreement with the ability to overbuild the incumbent operator at its own pace. Qwest has done this because both of these franchises do not require widespread build-out requirements, and because local franchising authorities ("LFAs") have not imposed heavy conditions for obtaining a franchise to serve an individual development. But a viable competitor cannot limit itself to those areas where it happens to find a pro-competitive LFA. As a result, notwithstanding program access costs and the significant regulatory hurdles described below, Qwest intends to significantly increase the number of communities in which it provides

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fiber facilities at RidgeGate will be used to provide video, telecommunications and high-speed Internet service to residents of the development.

competitive video services over the next several years. Indeed, Qwest already is in the process of obtaining CATV franchises in a number of those communities throughout the western United States.

Unfortunately, franchising is a particularly serious regulatory problem for competitive video providers such as Qwest. In order to serve a single geographic market, Qwest must obtain franchises from numerous local and municipal governments. This can be a difficult, expensive and protracted process that is often politically charged, and may in some cases prove fruitless.[4]

In addition to the problems associated with securing franchises from such a vast number of LFAs, Qwest's franchising difficulties largely stem from being asked to commit to build-out requirements that copy the footprint of the incumbent CATV provider and match the incumbent's existing service obligations. Requirements like these make it prohibitively expensive for competitors to enter the video market. They are also unrealistic, since the competitors are operating without the guaranteed service monopolies that municipalities typically extended to the incumbent when it was constructing its network. In many cases, this entrenches the monopoly position of incumbent CATV providers (which, not coincidentally, are often the prime or sole advocates for such measures), and harms consumers.

Consequently, these comments focus on the entry of incumbent local exchange carriers ("ILECs") such as Qwest into the competitive video market, either directly or in partnership with a video affiliate, and the steps the Commission can take to ensure the viability of such competition.

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[4] Qwest does not mean to imply that LFAs are uniformly acting in a manner which impedes competition. Despite often intense pressure from incumbent CATV operators, many LFAs attempt to use their local franchising power reasonably. But, given the balkanization of the process, the existence of pro-competitive LFAs only slightly mitigates the problems described herein.

II. THE COMMISSION NEEDS TO ACTIVELY PROMOTE WIRELINE-BASED VIDEO COMPETITION

A. Video Services Help Spur The Deployment Of Broadband

Broadband deployment and video services are closely linked. The market consensus is that wireline carriers must be able to offer all elements – a "triple play" of video, voice and high-speed data services – over a unified network in order to be a serious broadband competitor.[5] Video services are therefore an essential service for any wireline carrier that wishes to compete in the broadband marketplace. As the success of incumbent CATV providers has already demonstrated, video programming is the cornerstone of service bundles that include telecommunications, Internet and video services.[6]

Qwest's point is simple. The capacity of broadband makes it a natural delivery vehicle for video, and the ability to carry video programming is a natural incentive for companies to deploy broadband. This is especially true in the case of incumbent telephone companies, which already have a communications infrastructure in place that can form the foundation of broadband deployment. Unfortunately, regulatory rules or policies that stand in the way of video deployment by ILECs also stand in the way of broadband delivery to the maximum number of customers.

B. DBS Competition Is Not Effectively Constraining Rate Increases By Incumbent CATV Operators

The Commission has previously concluded that competition in the MVPD market is increasing, finding that "consumers today have viable choices in the delivery of video

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5 *See, e.g.,* Comments of the Broadband Service Providers Association, MB Docket No. 04-227 at 3-4 (filed July 23, 2004).

6 *See* Comments of The National Cable & Telecommunications Association, MB Docket No. 04-227 at 17-18 (filed July 23, 2004).

programming, and they are exercising their ability to switch among MVPDs."[7] To date, the Commission's findings have focused largely on the competition provided by DBS providers. That is natural, given the growth of the DBS market over the last 10 years. According to the Commission's statistics from 2004, approximately 24 million consumers now subscribe to DBS services in the United States.[8] DBS subscribership has been growing at double-digit rates,[9] increasing its market share to 25 percent of the overall MVPD market – compared with the 72 percent of consumers that receive their MVPD service from traditional cable operators.[10]

The growth of DBS, however, has not stopped incumbent CATV operators from increasing their rates at three-to-five times the rate of inflation.[11] When the average price per CATV channel is factored into the equation, the Commission has found that on average, CATV prices have increased by 7.3 percent in competitive markets and by 11 percent in uncompetitive

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7 *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, 2758 ¶ 6 (2005) ("*2005 Video Competition Report*").

8 *Id.* at 2759 ¶ 10.

9 *Id.* In contrast, CATV subscribership has been relatively stable. The *2005 Video Competition Report* stated that between June 2003 and June 2004, CATV subscribership increased slightly, but now represents a "smaller portion of the video programming market" due to the faster growth in DBS subscribership. *Id.* at 2759 ¶ 9.

10 *Id.*

11 *Id.* at 2772-73 ¶¶ 26-27. The Commission found that the average monthly CATV rate increased 5.6 percent in communities served by "noncompetitive cable operators" – *i.e.*, communities where a finding of "effective competition" has not yet been found – and 3.6 percent in communities where there was competition. *See also* General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO 04-8 at 14-15 (Oct. 24, 2003) ("*GAO Rate Report*") (concluding that multiple factors are driving rate increases for CATV services) *and* Consumer Federation of America and Consumers Union, *The Continuing Abuse of Market Power By the Cable Industry: Rising Prices, Denial of Consumer Choice, and Discriminatory Access to Content*, at 1-4 (Feb. 2004) (concluding that in real terms, the complaint that rates for CATV services have risen at more than three times the rate of inflation is correct).

markets during 2003, well in excess of the rate of inflation for that year.[12] Conversely, DBS rates have remained relatively stable.

Based on the evidence, then, one can fairly conclude that the presence of DBS appears to have had a negligible impact on what consumers pay for CATV service. In fact, while a recent report by the United States General Accounting Office ("GAO") concluded that the presence of a DBS competitor in a market generally led to slightly lower CATV rates, the difference was as little as $0.15 per month.[13]

Equally ironic, these CATV rate increases have not caused large scale migrations of CATV customers to DBS providers. As the *2005 Video Competition Report* noted, overall CATV subscribership has remained "relatively stable" or has even increased slightly, even while DBS subscribership was growing.[14]

Results are different when incumbent CATV providers face a wireline competitor, however. As the *GAO Rate Report* indicates, the Commission's data shows that consumers have the "opportunity to choose between two or more wire-based video operators" in just two percent of the nation's markets.[15] In situations where there <u>was</u> wireline competition in the MVPD market, however, the GAO documented that CATV rates ranged between 15 to 41 percent lower than the rates in similar markets without such competitors,[16] and that incumbent CATV operators

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12 *See 2005 Video Competition Report* at 2772-73 ¶ 26.

13 *See GAO Rate Report* at 11; *see also* General Accounting Office, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, at 4 (Feb. 2004) ("*GAO Wireline Report*"). The *GAO Wireline Report* was specifically commissioned by the Senate Judiciary Committee to determine the impact of wireline-based MVPD competition on the rates charged by incumbent CATV providers.

14 *2005 Video Competition Report* at 2759 ¶¶ 9-10.

15 *GAO Rate Report* at 9.

16 In its February 2004 study, the GAO examined six markets where there was wire-based MVPD competition, and found that the cable rates in five of the six markets were 15 to 41

responded to wireline MVPD competitors by lowering prices.[17] While the size of the GAO's statistical sample is small, the disparate competitive impact of DBS versus wireline-based competition is startling.

Simply put, competition from wireline MVPD providers is a far stronger constraint on CATV prices, and thus benefits consumers substantially.[18]

C. The Nature Of The Technology And The Availability Of Service Bundles Are Critical Factors In Video Competition

ILECs and their affiliated video providers are the most likely providers of wireline-based MVPD competition. This is due to many factors, including their: experience at providing broadband services, existing networks, technical resources, current rights-of-way, and ability to bundle their current voice and Internet offerings together with video services. This does not mean that ILECs are the only potential source of wireline competition or that they should receive preferred treatment. But it does mean that any pro-competitive video policy should not discriminate against ILECs.

ILECs already are a growing source of wireline MVPD competition with incumbent CATV providers. ILECs are already an established presence in the market and benefit from their networks and rights-of-way, as well as substantial technical resources. Also, unlike new market entrants, wireline ILECs already provide broadband services in most locations and are already established in the voice and Internet markets. These core attributes are essential for viable competitive entry into the video marketplace. Not coincidentally, most of the newer companies

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percent lower than in similar markets without wire-based competition. *See GAO Wireline Report* at 4, 15-16, 35.

17 *Id.* at 15.

18 *Id.* at 4.

that attempted to enter the video market while overbuilding their own broadband networks – such as WideOpenWest, RCN, WIN – are now gone or are barely surviving.

Moreover, Qwest's use of wireline technology offers advantages to the public that other technologies do not currently offer. DBS providers currently face technological limitations that preclude meaningful DBS entry into the voice and broadband markets. In contrast, the service bundles offered by wireline competitors like Qwest compete directly with the offerings of incumbent CATV providers. As the Commission and the GAO have both reported, incumbent CATV providers are broadening the array of services that they are selling to consumers, and consumers are increasingly using CATV providers as a one-stop shopping source when they purchase video, telephone and Internet services. Due to the limitations of their satellite bandwidth, DBS providers are not providing such bundles – although some, like DirecTV, have formed marketing partnerships with landline telephone companies, including Qwest.

Due to heavy consolidation in the MVPD business, ILECs are the only terrestrial competitors that can deliver economies of scale and pricing equal or superior to that of incumbent CATV providers. Qwest's example stands on point. In addition to offering its telephone and broadband services in conjunction with DirecTV's DBS services, Qwest has been an independent provider of competitive, wireline-based CATV services since 1996, when it launched its first system in Omaha, Nebraska. Qwest began providing similar wireline-based CATV service in Phoenix, Arizona in 1998, and in Douglas County, Colorado in 2000. To use the Phoenix market as an example, Qwest currently serves 45,000 video subscribers and offers 200+ channels of basic and expanded basic digital programming. Qwest's retail rates for these services are more than 25 percent lower than those of Cox Communications, the incumbent CATV provider in Phoenix.

III. LOCAL FRANCHISING REQUIREMENTS ARE HINDERING QWEST'S EFFORTS TO PROVIDE COMPETITIVE VIDEO SERVICES

Local franchising rules are often implemented and enforced in a manner that operates to protect incumbent CATV providers and discourage competitors like Qwest from entering the video market. Indeed, Qwest's experience is a case study of the serious problems new entrants have in obtaining the necessary franchises from municipal governments. In effect, the delays and expenses of this process act as a structural impediment to wireline competition in the video market. In order to further its statutory mandate to promote broadband deployment and competition in the video and telephony markets, the Commission should establish preemptive entry standards for competitive video providers and remove these barriers to entry that stem from the current franchising process.

A. The Franchising Problem

New entrants are put at a competitive disadvantage in the franchising process for a variety of reasons, including the following:

- While the initial franchising process may have been equally difficult for the incumbent CATV provider, most incumbents obtained their franchises at a time when they were the only provider of video services. Hence, the incumbents had a much greater expectation of a solid customer base and stable revenues when building out their network than is possible for a new market entrant today.

- Some franchise terms imposed by LFAs, such as build-out requirements, are simply not realistic when applied to a new entrant (*i.e.*, a second or third provider of video services in a market), even if they were realistic and fair when originally applied to the incumbent.[19]

- In general, the requirements for obtaining new franchises are more onerous than the requirements for renewal of an existing franchise.

- It is common for incumbent franchisees to attempt to use the local franchising process as a means of preventing competition – and often resort to threats of litigation if competitive entry is permitted. Such threats frequently delay, if not

[19] *See, e.g.*, 47 U.S.C. § 546.

fully paralyze the franchising process and short-circuit discussions regarding the scope of the new entrant's build-out and service obligations.

- On the flip side of the equation, incumbent CATV providers can enter the telephony markets of ILECs easily, with few if any regulatory restrictions, thus further tipping the competitive balance against video competition.[20]

Qwest does not oppose the imposition of reasonable franchise fees. On their own, franchise fees are neither anticompetitive nor a barrier to entry. However, the local franchising process itself can be time consuming, costly and ultimately anticompetitive.

B. Build-Out Requirements

The critical problem that Qwest faces in obtaining franchises is the frequent requirement for LFA-wide build-outs. Placing these requirements on a second or third video provider in a market is almost certain to stifle competition.

Based on Qwest's experience in the CATV business over the last nine years, Qwest believes that many LFAs appear to truly desire competition, and the benefits to consumers that come with competition. Unfortunately, the incumbent CATV companies have convinced LFAs that if the second provider does not execute a franchise agreement *identical* to that of the incumbent's agreement, then the LFA will face certain legal action to enforce the level playing field provisions. Paramount in these terms and conditions is the requirement that the second provider agree to a specific timeframe (usually five years or less) within which the alternative provider must make CATV services available to all subscribers in the franchise area. The resultant business model does not work, leaving consumers with a single wireline video opportunity.

Qwest's experience in the Phoenix market is a textbook example of the problem. In 1998, Qwest negotiated nine license agreements in the Phoenix area. At the time, Qwest was

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[20] *See* 47 U.S.C. § 541(b)(3)(A)-(D).

forced to agree to city-wide build-out requirements in each of its agreements. In every case, Qwest was to complete its construction in five years. Unfortunately, like other overbuilders who negotiated similar deals around the country, Qwest discovered that it was nearly impossible to compete directly with an incumbent cable provider under franchise build-out rules that made sense only in a monopoly environment.[21] Unlike almost every other competitive provider, however, Qwest chose not to shut its business down, and renegotiated all of its contracts to relieve itself from the build-out and line-extension requirements. Qwest was very fortunate to be able to successfully renegotiate these agreements and bring competitive choices to these locations. These renegotiations came at a substantial cost and represented an opportunity not available in many locations.

It appears to Qwest that the "build-out" rules are being established as the primary focus of efforts by incumbent CATV companies to restrict or avoid competition. The claim is that, in the absence of franchise-wide build-out obligations, new video entrants will not serve poorer communities – thus effectively red-lining their video deployments.[22] We emphasize that this is a phony argument by the incumbents.

Red-lining is prohibited by the laws of most states and by federal law.[23] Should a video provider engage in red-lining, its violation can be addressed in an enforcement action. The

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[21] Companies such as WideOpenWest, RCN and others negotiated full build-out agreements as well in their respective markets. In nearly every case, WideOpenWest was forced to abandon its franchise agreements without ever having acquired one subscriber.

[22] *See, e.g., Texas Cable & Telecommunications Assoc. v. Perry et al.*, Complaint, No. 05-CV-721 (W.D. Tex., filed Sept. 8, 2005). In this lawsuit, the Texas Cable and Telecommunications Association ("TCTA") is seeking to enjoin and overturn a recent Texas law that preempts municipal CATV franchising requirements. One of the TCTA's primary claims is that by allowing new market entrants to define the "footprint to be served within the municipality" themselves, without regulatory oversight, the new statute violates the red-lining prohibitions of Title VI. *Id.* at 10 (citation omitted).

[23] *See* 47 U.S.C. § 541(a)(3).

problem that competitive video providers face when seeking to navigate the local franchise process is that it is not economically feasible for them, as a second or third competitive entrant with no guaranteed revenue flow, to agree to the same build-out terms and conditions that were reasonable when applied to the first entrant. CATV providers recognize these financial realities when they design their telephony operations – they do not construct their systems on the same universal service scale as those of the ILECs against which they plan to compete. Indeed, if the CATV providers were required to meet the same standards as the ILECs, it is doubtful that cable companies would be able to enter the local telephony market. The same analysis applies to the universal build-out requirements that LFAs, with the encouragement of incumbent franchisees, are seeking to impose on many new video entrants through the franchising process.

C. Timing And Delay Issues

The amount of time that it takes wireline competitors to obtain franchises from local regulators is a major competitive impediment. This problem is particularly serious since Qwest's primary competitors – the incumbent CATV providers – face no such regulatory problems in entering Qwest's core businesses in the voice and Internet markets, and are subject to little or no regulation when they do.

Again, Qwest's experiences demonstrate the inherent delays of the franchising process. It has taken Qwest nearly three years of intensive effort to renegotiate its seven franchises in the Phoenix area, where Qwest is already operating under franchise, and to obtain eight new agreements in the Phoenix, Denver and Salt Lake City metropolitan markets. Despite the effort to obtain these franchises, Qwest still is only able to cover a small portion of the geographic area in these markets due to the fragmented nature of local franchising and the divergent demands of numerous local and municipal governments, each of which is its own LFA with its own regulatory requirements. At the current rate, assuming Qwest were able to negotiate acceptable terms and conditions with neighboring LFAs, it will take Qwest at least six more years to cover the complete footprint of the Phoenix, Denver and Salt Lake City markets. Often, Qwest will spend significant time in negotiating with LFAs only to discover that the LFA cannot or will not execute an acceptable franchise.

Specific examples illustrate the extent of this problem.[24] In one Arizona town where Qwest applied for a franchise, municipal officials retained an outside consultant to negotiate Qwest's franchise on the town's behalf. At the initial meeting of the parties in the summer of 2004, Qwest made its initial request for a limited franchise. The town's representatives informed Qwest that it would seriously consider a limited scope franchise, and they requested that Qwest submit an initial application for a franchise accompanied by an application fee. Qwest submitted the application, and the required fee, and met with town officials and their consultant on three more occasions. During those meetings, Qwest received repeated assurances that a limited scope agreement would be acceptable. Yet the town's consultant proceeded to take over three months to review the draft agreement. Six months ago, at the town's final meeting, Qwest was finally informed that: (i) Qwest would be required to build its video network out to the entire town; and (ii) in order to receive an acceptable franchise, Qwest would be required to provide free telecommunications services to the town with a value totaling nearly $50,000 annually. As a result, Qwest has ceased negotiations with the town and is looking elsewhere for an acceptable franchise.

As another example, Qwest met with municipal officials in a different Arizona city during the spring of 2005 to discuss a franchise. Qwest made a presentation to the city council

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[24] Because of ongoing negotiations, the specific towns are not named in these comments.

regarding a limited scope agreement in May, 2005. The city requested that Qwest provide a template agreement to the city using the incumbent license as a template. Qwest provided the city its revisions to the agreement in May, 2005. Despite repeated requests, and despite repeated contacts with the city, Qwest has yet to receive a single comment to its proposed contract. Qwest has now been forced to contact these officials for the simple purpose of getting comments to its proposed franchise. Assuming that the city opens a proceeding, a final franchise will lie many months – or possibly years – in the distance.

D. Additional Financial Obligations

In addition to build-out requirements – and because of the "level playing field" language in many municipal CATV regulations – many LFAs have required Qwest to either mirror or exceed the financial obligations of the incumbent operator to support Public, Educational, and Government ("PEG") access.

For example, Qwest approached a city in Arizona about the possibility of obtaining a limited scope franchise agreement in order to gain a foothold in a growing, competitive market. Cox, the incumbent CATV operator in the city, had only recently completed its renewal. As part of that renewal, the city requested that Cox pay the city $37,000 as an initial capital grant to assist the city in the development of its PEG facilities. Cox agreed, remitted these funds, and was able to complete its renewal. When Qwest approached the city about a limited scope agreement, the city informed Qwest that it was not satisfied with the deal struck with Cox, and that Qwest's application would not be approved unless Qwest agreed to pay the city $225,000 for the same purpose. Qwest was unable to justify this payment in its business plan, and no longer has any plans to obtain a franchise in that city.

E. Legal Assurance And Indemnification Costs

Incumbent CATV operators frequently threaten that they will take legal action against LFAs under the guise of "level playing field" provisions of many local ordinances if the LFAs do not subject new market entrants to the same exact requirements as the incumbents. This has made the LFAs justifiably fearful of expensive, protracted lawsuits. In turn, the LFAs' fear of litigation prevents wireline video providers from negotiating flexible terms with the LFAs, and is yet another impediment that bogs down the franchising process for new entrants. For example, in 12 out of its 15 franchises, Qwest has been forced to agree to a complete indemnity of the LFA to protect it from a potential lawsuit. In fact, the "indemnity" is normally part of Qwest's initial discussions with LFAs before a proposed agreement is even reviewed.

F. Reporting And Record Requirements

As a consequence of the regulatory fragmentation that results from franchising authority residing in local governments, wireline service providers that wish to enter the video services usually face a patchwork of inconsistent regulatory requirements in adjacent jurisdictions. Once again, this patchwork of requirements raises the costs that competitors face in entering markets and acts as a financial and administrative impediment to providing services.

For example, it is routine for one LFA to require extensive reporting requirements on retention of records related to customer complaints, while the neighboring LFA requires completely different information. From an operational perspective, this makes it difficult for Qwest to maintain any consistency in its records, and significantly increases Qwest's administrative costs. In addition, it is routine for one LFA to require that Qwest collect and remit one monthly sum of money per subscriber to support PEG capital costs, while a neighboring LFA might require a completely different sum. This makes billing, tracking and accounting very difficult, particularly for new market entrants.

G. Multiple Franchising Authorities Within A Single Market Exacerbates The Problems Outlined Above

Further aggravating these problems, a potential provider of competitive video service must negotiate with multiple franchising authorities in order to be able to serve a single market. Qwest, for example, can provide video service only in those LFAs that negotiate an acceptable agreement, and is at the mercy of each LFA's timetable, processes and personnel. In the long term, this does not work. For competition in the video market to succeed, an alternative provider must be able to compete in an entire metropolitan area (but it must be allowed to expand to the entire area on its own economically-feasible timetable). Without full coverage, there are tremendous marketing and business hurdles. In the Denver metropolitan area, for example, there are 39 communities each of which require separate franchise agreements. A consolidated approach to video entry is necessary even if the problems outlined above were to be solved on a general basis.

H. The Commission Has The Authority To Solve The Franchising Problem

Congress has granted the Commission the authority to develop nationwide CATV policies and assigned it the job of encouraging the deployment of broadband services. As such, the Commission has clear legal authority to resolve the franchising problems that impair video competition. Using these powers, the Commission should preempt the thousands of different requirements imposed by hundreds of local governments by issuing a single, uniform set of franchising standards that will encourage competition (rather than hinder it at every step). Local franchise requirements should be limited to fees, rights-of-way and public service requirements such as community access channels and connections to schools and libraries.

Title VI of the Communications Act recognizes the right of local governments to grant franchises – and provides that a cable operator may not provide service without a franchise.[25] It is also the case, however, that Title VI gives the Commission broad authority to "establish franchise procedures and standards which encourage the growth and deployment of cable systems[,]"[26] and "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems[.]"[27] Likewise, the Commission has the authority to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[28] Lastly, Section 706 of the Telecommunications Act of 1996 authorizes the Commission to regulate in such a way that encourages the deployment of advanced services.[29]

This statutory scheme clearly leaves the final authority in the hands of this Commission. Ultimately it is the responsibility of the Commission to develop a national policy on both video and broadband deployment, and the Commission's preemptive authority is available when state or local regulatory action stands as a barrier to implementation of this policy. Local franchising rules are operating to prevent competition in the video market, thus depriving customers of the benefits of competition for both broadband and video services. The proper action is for the Commission to preempt all LFA authority in the following areas:

- Mandatory build-out requirements;

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25 *See* 47 U.S.C. § 541(b)(1).

26 *See* 47 U.S.C. § 521(2).

27 *See* 47 U.S.C. § 521(3).

28 *See* 47 U.S.C. § 521(6).

29 *See* 47 U.S.C. § 157 note (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) ("1996 Telecom Act")).

- Financial guarantees (when the applicant already has access to public rights-of-way under an alternative grant, such as a telephone carrier or a power company);
- Provision of free services to the LFA; and
- Local reporting and record-retention requirements.

These preemptions would leave LFAs with the ability to collect nondiscriminatory franchise fees and to manage access to their public rights-of-way. At the same time, however, they would significantly streamline the regulatory hurdles faced by wireline competitors.

Qwest sets these matters before the Commission as legal and regulatory facts.[30] Upon review of the comments in response to the notice in this proceeding, Qwest will provide further legal analysis on the Commission's authority to preempt LFA franchising rules. Given the scope of the Commission's authority in this regard as has already been confirmed by reviewing courts,[31] Qwest is operating on the assumption that the Commission's preemption authority, assuming of course the existence of a proper record, should be non-controversial (or at least incontrovertible).[32]

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[30] Chairman Martin has suggested that the Commission's preemptive authority might be found in Section 621(a) of the Act, which prohibits a LFA from granting an exclusive franchise or from unreasonably refusing to award a second or third franchise, as a statutory means of effectuating the federal policy regarding competition in the provision of video services. Qwest agrees that this statutory provision provides an additional statutory basis for preemption. However, Section 621(a) is not, nor should it be, the sole basis of federal authority.

[31] *See Guidry Cablevision v. City of Ballwin*, 117 F.3d 383, 386 (8th Cir. 1997) (upholding the Commission's private system exemption and preempting local regulation); *Southwestern Bell Wireless Inc. v. Johnson County Brd. of County Commissioners*, 199 F.3d 1185, 1192-93 (10th Cir. 1999) (exclusive federal regulation occupies the field); *National Cable Television Ass'n v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994) (upholding Commission determination that franchises are not necessary for video dial-tone services).

[32] The *City of Dallas* decision is not to the contrary. *See City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999). In that case the Fifth Circuit held that the open video system provisions of the 1996 Telecom Act did not automatically preempt state or local franchising authority. *See id.* at 347-49. The decision had nothing to do with the Commission's ability to preempt that authority based on a proper preemption record.

IV. THE COMMISSION MUST CONTINUE TO ENSURE THAT NEW ENTRANTS HAVE FAIR AND NONDISCRIMINATORY ACCESS TO VIDEO CONTENT

As shown above, there is much the Commission can do to eliminate barriers to entry for wireline providers that, like Qwest, are prepared to commit the enormous resources necessary to build and operate full service networks that will provide the highest level of competition to incumbent CATV operators offering diverse bundles of video, voice and data services to their customers. By the same token, the Commission has long recognized that "access to programming is an essential prerequisite to the ability to compete against incumbent [CATV] operators."[33] In other words, any gains from the regulatory reforms recommended above will be lost in short order if the Commission's rules create any ambiguity over whether Qwest and other new wireline competitors will have fair and nondiscriminatory access to video content over the longer term. Chairman Martin has already highlighted how regulatory uncertainty chills investment in broadband networks, and the issue is compounded where those same networks also provide video service.[34] Qwest therefore urges the Commission to minimize regulatory uncertainty for new video providers by reaffirming their rights of access to video content as specified below.

At the outset, the Commission must recognize that federal law on access to video content creates a timing problem for new entrants. Presently, the most significant federal protections for new entrants seeking access to video content are (1) the ban on exclusive CATV programming

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[33] *See In the Matter of Outdoor Life Network and Speedvision Network, Petition for Exclusivity pursuant to 47 C.F.R. § 76.1002(c)(4) and (5),* Memorandum Opinion and Order, 13 FCC Rcd 12226, 12235 ¶ 18 (CSB, 1998) ("*Outdoor Life*").

[34] *See* Remarks by Chairman Kevin J. Martin, Federal Communications Commission, To The NARUC Summer Meeting, Austin, TX (July 26, 2005) ("We also suffer from a market-distorting lack of regulatory certainty in the broadband market. Most prominently, for some time there has been a lack of regulatory parity between telcos and cable in their provision of broadband. This lack of a level-playing field in the market complicates investment decisions and has undoubtedly inhibited broadband deployment in the United States.").

contracts in the federal program access statute, the sunset of which the Commission recently extended to October 5, 2007,[35] and (2) the statutory ban on exclusive retransmission consent contracts for off-air television signals,[36] the sunset of which Congress recently extended to January 1, 2010 in Section 207 of the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA").[37] Qwest and many other providers of competitive video services thus are at risk of losing their protection under both statutes in less than five years, well before they have an adequate opportunity to realize meaningful returns on the billions of dollars they must invest over the next decade towards building, marketing and operating full service networks capable of competing aggressively with incumbent CATV operators. It is for this very reason, among others, that the United States Telecom Association ("USTA") recently adopted the following policy statement on access to content:

> As communications companies that traditionally have offered telecommunications services begin offering video services, it is critical that they have access to content. *There are, however, a number of potential roadblocks to that access: current program access rules are set to expire in a matter of years; certain cable/programming companies seek an even earlier sunset of those rules; and the rules do not necessarily reflect the changing technological and competitive environment in the market...* It is critical, therefore, that USTA support reasonable access to content by *all* providers, on a technology-neutral basis, on reasonable rates, terms and conditions.[38]

Further, the separate, inconsistent regulatory frameworks for access to video content cause additional uncertainty for new entrants and should not be preserved. For example, the federal program access law explicitly prohibits discriminatory behavior, but the federal

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35 *See* 47 U.S.C. § 548(c)(2)(D); 47 C.F.R. § 76.1002(c)(6).

36 47 U.S.C. § 325(b)(3)(C)(ii).

37 *See* Pub. L. No. 108-447, 118 Stat. 2809, 3428 (2004). SHVERA was enacted as Title IX of the Consolidated Appropriations Act, 2005.

38 *See* United States Telecom Association Policy on Access to Content, adopted Feb. 1, 2005 (emphasis added).

retransmission consent law does not.[39] The federal program access law only covers "vertically integrated" programming (*i.e.*, programming in which a CATV operator holds a cognizable ownership interest), whereas the federal retransmission consent law covers any programming carried over an off-air television signal, vertically integrated or not.[40] Similarly, the federal program access law only applies to that CATV programming that a MVPD receives via satellite delivery; the federal retransmission consent law applies to any programming carried via an off-air television signal, regardless of its source.[41] And while the Commission has explicit statutory authority to extend the ban on exclusive CATV programming contracts beyond its statutory sunset date, the Commission has no such explicit authority under the federal retransmission consent law (meaning that the existing January 1, 2010 sunset date for the ban on exclusive retransmission consent agreements may be extended only through an act of Congress).[42]

The Commission should not preserve separate, inconsistent regulatory frameworks for access to video content. The present distinction in the law between CATV programming and off-air television broadcast programming has little relevance today – from a subscriber's perspective, content is content regardless of the source. Indeed, the steady rise in viewership of CATV networks versus that of television broadcast networks confirms that in many cases subscribers see the two as complementary, if not entirely interchangeable. Qwest has found this to be especially true with regard to sports programming – the success of regional CATV sports networks is largely attributable to their carriage of games and other sporting events that are unavailable on local off-air television stations. Yet without carriage of regional CATV sports

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39 *Compare, e.g.*, 47 U.S.C. §§ 325(b)(2)(C)(ii), 548(c)(2)(B).

40 *Compare, e.g.*, 47 U.S.C. §§ 325(b)(2)(C)(ii), 548(c)(2)(D).

41 *Compare, e.g.*, 47 U.S.C. §§ 325(b), 548(c)(2)(D).

42 *Compare, e.g.*, 47 U.S.C. §§ 325(b)(2)(C)(ii), 548(c)(5).

networks *and* local off-air television stations, it would be impossible for Qwest to provide the complete menu of sports programming its subscribers have come to demand. Simply put, it is difficult to square the parallel but separate regulation of program access and retransmission consent with how CATV network and off-air television programming is marketed to subscribers in today's multichannel video environment.

Moreover, the timing problems and regulatory inconsistencies discussed above only aggravate pre-existing weaknesses in the federal program access and retransmission consent laws. For example, Section 548(c)(2)(D)'s ban on exclusive CATV programming contracts is the glue that holds together the entire program access law, since Section 548's remaining provisions regarding unfair practices, undue influence and price discrimination have little practical significance if programmers are afforded an unlimited right to withhold their programming by entering into exclusive contracts with incumbent CATV operators.[43] A premature sunset of Section 548(c)(2)(D) thus would be tantamount to elimination of the *entire* program access law for wireline competitors who otherwise do not have the bargaining leverage necessary to acquire programming on nondiscriminatory terms and conditions. Likewise, the Commission has recognized that a new MVPD entrant's protections under the current retransmission consent law only go so far, a compelling consideration now that television

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[43] In addition, the Commission has acknowledged that the current program access law does not protect cable's competitors against economic harm from "temporary foreclosure," *i.e.*, the process through which a supplier of valuable programming extracts a higher price by threatening to withhold that programming from a new entrant), since the law was "not intended to regulate or address the level of [programming] rates *per se*. Moreover, . . . even if the program access rules adequately address rate levels (and not just discrimination), [the program supplier] would still be able to withhold programming pending resolution of a program access complaint." *In the Matter of General Motors Corporation and Hughes Electronics Corporation and The News Corporation Limited*, Memorandum Opinion and Order, 19 FCC Rcd 473, 547 ¶ 162 (2004) (footnotes omitted).

stations are preparing to adopt a rigid "pay cash or else" stance in the upcoming round of retransmission consent negotiations for the 2006-2009 "election period."[44]

Qwest acknowledges that harmonizing and strengthening the federal program access and retransmission consent laws may in certain instances require further statutory amendments by Congress, and that in those situations the Commission cannot act until such statutory amendments become law. Nonetheless, Qwest believes that the Commission can and should address the problems discussed above via rule amendments wherever it can, and, where it cannot do so, make specific recommendations to Congress as to what statutory amendments are necessary to achieve the desired results.

Qwest thus urges the Commission to do the following:

- Pursuant to its authority under the federal program access law, delay any sunset of the statutory ban on exclusive CATV programming contracts at least until the statutory sunset date for the ban on exclusive contracts for retransmission consent (January 1, 2010);
- Ask Congress to give it explicit statutory authority to extend the January 1, 2010 sunset date for the ban on exclusive retransmission consent contracts where the Commission believes it is in the public interest to do so;

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44 *Id.* at 569 ¶ 211 ("Although the [Communications] Act and our rules are important safeguards by requiring good faith negotiation with MVPDs and prohibiting exclusive retransmission consent agreements, these statutory and rule provisions do not prevent broadcasters from withholding their signals while retransmission consent negotiations are in progress, nor do they require that access be provided on non-discriminatory terms and conditions."). *See also* Moss, "Nexstar Cites Retrans 'Good Faith' Effort; Cox, Broadcaster Sparring at FCC," *Multichannel News*, at 43 (Feb. 14, 2005). Wireline-based competitors, including the RBOCs, have little negotiating leverage and will face pressure to agree to cash-for-carriage deals, eroding their margins, exacerbating an expected 15%-programming-cost disadvantage and limiting their video-pricing flexibility. *See* Whitney, "Do Content Providers Hold All the Cards," *Xchange*, at 31 (March 2005) (quoting Moffett: "Often, negotiating leverage in programming agreements manifests itself as the ability to say 'no.' Comcast's ability to say 'no' is a lot greater than Verizon's ability to say 'no.' That's because Comcast has 21 million subscribers and is considered a critical 'must have' for any content provider, whereas Verizon has no subscribers as of yet.").

- Ask Congress to amend the federal program access statute so that the full protections of the law applies equally to *all* CATV programming, regardless of whether it is satellite-delivered or vertically integrated; and

- Ask Congress to amend the Communications Act as necessary to ensure that the provisions thereof relating to program access and retransmission consent incorporate the same prohibitions against discriminatory behavior, unfair practices and other unlawful conduct.

V. CONCLUSION

The Commission should take affirmative steps to promote wireline video competition. Since wireline competition is presently being frustrated by LFAs and incumbent CATV providers, the Commission should undertake proceedings to preempt those local franchising requirements that are functioning as barriers to entry. Likewise, with respect to its program access rules and retransmission consent rules, the Commission needs to actively ensure that new market entrants will continue to obtain access to video content over the long term at reasonable rates, terms and conditions.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: Michael B. Adams, Jr.
Blair A. Rosenthal
Robert B. McKenna
Michael B. Adams, Jr.
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6652

Its Attorneys

September 19, 2005

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the Secretary of the Federal Communications Commission via its Electronic Comment Filing System in MB Docket No. 05-255 and served, via email, on the FCC's duplicating contractor, Best Copy and Printing, Inc. at FCC@bcpiweb.com.

/s/ Richard Grozier

September 19, 2005